

STATE BAR COURT OF CALIFORNIA  
HEARING DEPARTMENT – LOS ANGELES

|                                   |   |                      |
|-----------------------------------|---|----------------------|
| In the Matter of                  | ) | Case Nos.:06-O-12761 |
|                                   | ) |                      |
| GARY LEWIS MARK                   | ) |                      |
|                                   | ) | DECISION             |
| Member No. 90474                  | ) |                      |
|                                   | ) |                      |
| <u>A Member of the State Bar.</u> | ) |                      |

INTRODUCTION

Respondent **Gary Lewis Mark** (Respondent) is charged here with one count of willfully violating rule 4-100(A) of the Rules of Professional Conduct<sup>1</sup> (commingling personal funds in a client trust account). The State Bar had the burden of proving that charge by clear and convincing evidence. Because it has done so, the court finds culpability and recommends discipline as set forth below.

PERTINENT PROCEDURAL HISTORY

The Notice of Disciplinary Charges (NDC) was filed in this matter by the State Bar of California on September 30, 2009. On November 16, 2009, an initial status conference was held by the court, attended by the parties. At that time the matter was scheduled to commence trial on February 17, 2010.

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<sup>1</sup> Unless otherwise noted, all future references to rule(s) will be to the Rules of Professional Conduct.

On February 16, the pretrial conference was held in the matter. At that time Respondent was ordered to file his formal response to the NDC and comply with the required pretrial conference disclosure procedures on or before the commencement of trial, which was then postponed for one day, to February 18, 2010.

Respondent filed his response to the NDC on February 18. Trial was commenced and completed on February 19, 2010. The matter was submitted on that date.

The State Bar was represented at trial by Deputy Trial Counsel Elina Kreditor. Respondent acted as counsel for himself.

## **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

### **Jurisdiction**

Respondent was admitted to the practice of law in California on November 29, 1979, and has been a member of the State Bar at all relevant times.

### **Case No. 06-O-12761**

### **Facts**

In 1999, Respondent opened a designated client trust account at City National Bank, account number xxx1168. (CTA) Later in that same year, he suffered significant physical difficulties, ultimately resulting in him becoming disabled from the practice of law and the closing of his office by 2002.

Although Respondent was no longer actively practicing law, he remained an active and eligible member of the bar. He also allowed the CTA to remain open until 2005.

In early 2005, Respondent was using a bank account at Washington Mutual Bank for his personal account. However, after Respondent's estranged wife became embroiled in a dispute with Respondent and then placed a levy on the account, Respondent made a decision to do his personal banking elsewhere.

At about the same time, Respondent received a notice that, because of the inactivity in his CTA, the state was about to escheat the small balance of funds still deposited in the account. Respondent then decided to utilize the CTA for his personal banking. With the apparent belief that he could use the account for his personal banking if there were no client funds in the account, he withdrew on June 23, 2005, the small balance of money originally on deposit in the account, while he deposited into the account on that same day what were unquestionably his personal funds.<sup>2</sup> His deposits subsequently included two Social Security checks for the month of June (totaling \$2,471.00) and another two Social Security checks for the month of July (also totaling \$2,471.00).

In a further effort to be able to use the account for his personal purposes, Respondent ordered new checks which identified the account as being only for “The Law Offices of Gary L. Mark.” The statement on the prior checks, that the account was a client trust account, was eliminated on these new checks. Respondent also frequently used counter checks and temporary checks issued by the bank. When these checks were used, he would handwrite on the checks the account number and his name, but make no indication that the bank account was a client trust account. Respondent believed that eliminating all such “client trust account” language on the checks would further enable him to utilize the account for his personal banking.

Between July 7, 2005 and August 31, 2005, Respondent repeatedly issued checks drawn against personal funds in the CTA to cover personal expenses. These checks included a check on July 7, 2005, to Whole Foods in the amount of \$339.22; a check on July 21, 2005, to Sam’s Cheesecake in the amount of \$25; and a check on August 16, 2005 to Best Buy in the amount of \$118.78.

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<sup>2</sup> There is no evidence that Respondent’s handling of this small balance of money was misappropriation of client funds or other misconduct.

Respondent's efforts after June 23, 2005, to differentiate his new use of the account as his personal account from the account's original designation as a client trust account, was not without occasional lapses. Significantly, on several occasions after June 23, 2005, Respondent issued checks for personal transactions, using personal funds, on check stock bearing the designation, "Law Offices of Gary L. Mark Attorney Client Trust." The July 7 check to Whole Foods, described above, was one of such checks.

Respondent also failed to have the bank terminate its internal designation and labeling of the account as a client trust account. As a result the account continued to be designated by the bank as an "Attorney Client Trust" account. This continuing client trust account designation was noted in all of the monthly bank statements sent to Respondent by the bank after June 23, 2005, until the account was eventually closed in October 2005. The bank also continued to transfer all of the interest accruing on the account to the State Bar each month, a fact also noted in each of the monthly statements.<sup>3</sup>

In September 2005, creditors of Respondent sought to levy against the CTA. The bank notified Respondent of that fact and Respondent made no attempt to argue that the account was not subject to the levy.

In October 2005, the bank account was closed.

Respondent at trial testified that he believed that the CTA had been closed by the bank in June 2005. That testimony is rejected by the court as not credible. Any contention that Respondent believed the CTA was closed on June 23, 2005, when he says he "zeroed" out the account, is completely belied by Respondent's conduct in the weeks following June 23, when he was writing checks on the account, using his old CTA checks with the client trust account

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<sup>3</sup> Because the account was identified as a client trust account, the bank also notified the State Bar when an NSF check was received by the bank. It was because of such a report that the instant proceeding was initiated, although the possible issuance of an NSF check is not a basis for any contention of culpability in this proceeding.

designation. If Respondent had believed at that time that the account had been closed, his writing checks on the closed account would have been highly inappropriate. Moreover, there is no indication whatsoever in the bank's records that Respondent ever sought to close the CTA in June 2005. While Respondent argued at trial that the "Supersedure Agreement" in the bank's file was evidence of a request to close the account in June 2005, an inspection of the document makes clear that the document was prepared in 1999 (six years earlier) and was only for the purpose of changing the authorized signatories on the account. Those facts were further confirmed by the testimony of a bank representative.

The court also does not find that Respondent had the account converted by the bank from a client trust account to a personal account in June 2005. Again, there is no written evidence of any such request by Respondent in 2005, including in Respondent's explanation to the State Bar in November 2005 regarding his handling of the account. Further, the testimony of the bank representative was clear, credible and convincing that the bank would not have accepted a request to convert the policy from a trust account to a personal account. Instead, the bank would have merely closed the first account and opened a new and different account. That did not happen. Finally, the evidence is uncontradicted that Respondent received each month until the account was closed a statement identifying the account as an "Attorney Client Trust" account. Although Respondent acknowledges that he reviewed these statements, he did not express concern at the time about the designation or take any steps to have that continued designation of the account by the bank discontinued.

#### **Count 1 – Rule of Professional Conduct, Rule 4-100(A) [Commingling]**

Rule 4-100(A) provides that all funds received or held for the benefit of clients must be deposited in an identifiable bank account which is properly labeled as a client trust account and that no funds belonging to an attorney or law firm shall be deposited in such an account or

otherwise commingled with such funds. Respondent's conduct in depositing personal funds into his CTA and then using that account to pay personal expenses constituted a willful violation by him of the rule against commingling set forth in Rule 4-100(A).

Respondent argues that no violation of rule 4-100(A) occurred because (1) no client funds were in the CTA after June 23, 2005; (2) he was generally using checks on the account which did not include any description of the account as being a client trust account; and (3) he no longer intended to use the account for client purposes. These arguments are all contrary to existing authorities.

Virtually the same arguments were made and rejected in *Doyle v. State Bar* (1982) 32 Cal.3d 12, 23:

Petitioner's contention that he was using his account for purely nontrust purposes, even if true, is of little help to him in these proceedings, because such use of a trust account violates rule 8-101 [now rule 4-100] of the Rules of Professional Conduct, which disallows commingling of personal and trust funds. Petitioner argues that at the time the account was used as a personal account, no client funds were on deposit and therefore, no commingling occurred. It is urged that rule 8-101 does not prevent an attorney from using for personal purposes an account formerly used as a trust fund, and still labelled as such. Rule 8-101 provides, however, that client funds "shall be deposited in one or more identifiable bank accounts labelled 'Trust Account,' 'Client's Funds Account' or words of similar import . . . and no funds belonging to the member of the State Bar or firm of which he is a member shall be deposited therein or otherwise commingled therewith . . . ." (Italics added.) The rule absolutely bars use of the trust account for personal purposes, even if client funds are not on deposit. Because petitioner used the account while it was still denominated a trust account, even if he no longer intended to use it for trust purposes, rule 8-101 was violated. The rule leaves no room for inquiry into the depositor's intent. [Underlining added.] The rule absolutely bars use of the trust account for personal purposes, even if client funds are not on deposit.'" (32 Cal. 3d at p. 23; see also *Arm v. State Bar* (Cal. 1990) 50 Cal. 3d 763, 777; *Hamilton v. The State Bar* (1979) 23 Cal.3d 868, 876; *In the Matter of Doran* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 871.)

Nor is Respondent's contention that he generally used checks not labeled as being for a client trust account a defense to culpability here. The nature of the account is not measured by the name the member chooses to put on the checks he writes, but instead is determined by the manner in which the account is established and maintained by Respondent with the bank. Here

the account continued to be designated by Respondent with the bank as a client trust account, a fact that was communicated on a monthly basis to Respondent. Moreover, Respondent continued to write checks on the account using checks stating that it was a client trust account. Even under his theory that the labeling on the checks controls, his acts in continuing to occasionally use such checks constitutes a willful violation of rule 4-100(A).

### **Aggravating Circumstances**

The State Bar bears the burden of proving aggravating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(b).)<sup>4</sup>

### **Pattern**

At trial the State Bar argued that Respondent's repeated use of the CTA over a period of three months as a personal account constitutes a pattern of misconduct. This court disagrees. While it is clear that Respondent issued multiple improper checks on the same account, this conduct reflects a single misunderstanding by him of the inadequacy of his efforts to convert an existing but dormant CTA into a personal non-fiduciary account. There is no evidence of any such conduct with regard to the client trust account before 2005 or with regard to any other subsequent account. The fact that Respondent consistently and openly used the account as his personal account (while eliminating on the newly issued checks any indication that the account remained a client trust account) is more probative of his good faith in the situation than any indication that additional discipline is needed or warranted because of that conduct.

### **Mitigating Circumstances**

Respondent bears the burden of proving mitigating circumstances by clear and convincing evidence. (Standard 1.2(e).) The court finds mitigation as follows:

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<sup>4</sup> All further references to standard(s) are to this source.

### **No Prior Discipline**

Respondent had been an active member of the bar for nearly 26 years before the instant misconduct occurred. During that time, Respondent had no prior record of discipline. This lengthy tenure of discipline-free practice is entitled to significant weight in mitigation. (Std. 1.2(e)(i).)

### **Physical/Emotional Disabilities**

Respondent, throughout the relevant time period, was dealing with the difficulties caused by his physical impairment, complicated by an emotional divorce and having been burned out of his house by the San Diego fires. The State Bar conceded at trial that this was a mitigating factor. This court agrees.

### **Community Activities**

Respondent testified briefly that he had performed pro bono work in the past and had acted as a pro tem judge in the workers compensation arena. This evidence was not contested by the State Bar. While the court affords Respondent some mitigation credit for such efforts, the evidence was not sufficiently detailed to warrant this court affording more than modest mitigation credit for such activities.

### **No Harm**

Respondent has demonstrated that there was a lack of any harm caused by his misconduct. This is a mitigating factor. (Std. 1.2(e)(iii).)

### **Excessive Delay in Prosecuting**

Respondent contends that the State Bar's delay in filing any charges in this matter is a mitigating factor. As noted, the misconduct occurred in mid-2005; the State Bar was notified on the underlying events at the time; Respondent corresponded with the State Bar about the situation in 2005 and 2006; and the declaration of the custodian of records of the bank,

authenticating the bank's records, is dated February 1, 2007. Why the State Bar waited until September 30, 2009, to file the charges went unexplained at trial.

Standard 1.3(e)(ix) provides that a factor to be considered in mitigation is "excessive delay in conducting disciplinary proceedings, which delay is not attributable to the member and which delay prejudiced the member." Although there was excessive delay in filing this matter and the delay was not attributable to Respondent, the court declines to grant Respondent mitigation credit under standard 1.3(e)(ix). There was no clear and convincing evidence that the delay prejudiced Respondent.

The court does, however, give Respondent mitigation credit under standard 1.3(e)(viii). That standard states that a mitigating factor is "the passage of considerable time since the acts of professional misconduct occurred followed by convincing proof of subsequent rehabilitation." It is now approaching 5 years since Respondent's inappropriate use of his CTA for several months in 2005. Since that time the account has been closed and there is no indication of any further mishandling by Respondent of a CTA or of any other misconduct. While Respondent contested the legal correctness of the State Bar's position about commingling, his testimony and other conduct at trial made clear to the court that he is fully prepared to accept and abide by this court's decision on the issue.

## **DISCUSSION**

The primary purposes of attorney discipline are to protect the public, the courts, and the legal profession; to maintain the highest possible professional standards for attorneys; and to preserve public confidence in the legal profession. (Std. 1.3; *Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.) In determining the appropriate level of discipline, the court looks first to the standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d 1085, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) Although the standards are

not binding, they are to be afforded great weight because “they promote the consistent and uniform application of disciplinary measures.” (*In re Silverton* (2005) 36 Cal.4th 81, 91-92.) Nevertheless, the court is “not bound to follow the standards in talismanic fashion. As the final and independent arbiter of attorney discipline, we are permitted to temper the letter of the law with considerations peculiar to the offense and the offender.” [Citations.]” (*In the Matter of Van Sickle* (2006) 4 Cal. State Bar Ct. Rptr. 980, 994, quoting *Howard v. State Bar* (1990) 51 Cal.3d 215, 221-222.) In addition, the courts consider relevant decisional law for guidance. (See *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311; *In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676, 703.) Ultimately, in determining the appropriate level of discipline, each case must be decided on its own facts after a balanced consideration of all relevant factors. (*Connor v. State Bar* (1990) 50 Cal.3d 1047, 1059; *In the Matter of Oheb* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 920, 940.)

In the present proceeding, the most severe sanction for Respondent's misconduct is found in standard 2.2(b), which provides: “Culpability of a member of commingling of entrusted funds or property with personal property or the commission of another violation of rule 4-100, Rules of Professional Conduct, none of which offenses result in the wilful misappropriation of entrusted funds or property shall result in at least a three month actual suspension from the practice of law, irrespective of mitigating circumstances.”

Despite the ostensible mandatory language of this standard, both this court and the Supreme Court have declined to treat it as binding and have instead ordered discipline at levels not including any suspension. (See, e.g., *In the Matter of Respondent E* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 716, 730-731, and cases cited therein.)

It is frequently said by this court that the purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, preserve public confidence in the profession,

and maintain the highest possible professional standards for attorneys. That statement has real significance in this situation, where there is absolutely no reason to believe that Respondent, after only slight intervention by this court, will pose any risk in the future to the public, the profession, or the courts. Rather, he has been a longtime and apparently valued member of the bar with no history of other ethical lapses. His misconduct in 2005 was short-lived and long ago. His misconduct, while technically a violation of rule 4-100(A), involved neither a client nor a client's funds; and it resulted in no harm to anyone or anything. Finally, Respondent is not now practicing law and has not for nearly a decade. There is no evidence suggesting that he will practice law again in the future, and there was ample reason to conclude that he will not.

That said, the court cannot condone Respondent's conduct or allow it to pass without some discipline. An important purpose of this process is to maintain the highest possible professional standards for attorneys. This is particularly important in matters involving the proper handling of client trust accounts.

Accordingly, the court concludes that the proper discipline in this matter is a public reproof with conditions of reproof. In reaching that conclusion the court finds guidance in the Review Department's decision in *In the Matter of Respondent E, supra*, 1 Cal. State Bar Ct. Rptr. 716. There the court reversed a decision of the Hearing Department judge, who had recommended the minimum 90-day actual suspension set forth in standard 2.2, and concluded instead that only a private reproof was warranted. While the respondent there had somewhat stronger mitigation evidence than here, including more extensive character evidence, the cases are otherwise quite comparable.

## DISCIPLINE

### Public Reproval

Accordingly, it is ordered that respondent **GARY LEWIS MARK** is hereby publicly reprovled. Pursuant to the provisions of rule 270(a) of the Rules of Procedure, the reproval shall be effective when this decision becomes final.

### Conditions of Reproval

Further, pursuant to rule 9.19 of the California Rules of Court and rule 271 of the Rules of Procedure, the court finds that the interests of Respondent and the protection of the public will be served by the conditions specified below being attached to the reproval imposed in this matter. Failure to comply with any of the conditions attached to this reproval may constitute cause for a separate disciplinary proceeding for willful breach, *inter alia*, of rule 1-110 of the Rules of Professional Conduct.

Respondent is hereby ordered to comply with the following conditions<sup>5</sup> attached to his public reproval for a period of one year following the effective date of the reproval imposed in this matter:

1. Respondent must comply with the provisions of the State Bar Act and the Rules of Professional Conduct.
2. Respondent must maintain, with the State Bar's Membership Records Office *and* the State Bar's Office of Probation, his current office address and telephone number or, *if no office is maintained*, an address to be used for State Bar purposes. (Bus. & Prof. Code, § 6002.1, subd. (a).) Respondent must also maintain, with the State Bar's Membership Records Office *and* the State Bar's Office of Probation, his current home address and

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<sup>5</sup>See rule 271, Rules of Proc. of State Bar (motions to modify conditions attached to reprovals are governed by rules 550-554 of the Rules of Procedure).

telephone number. (See Bus. & Prof. Code, § 6002.1, subd. (a)(5).) Respondent must notify the Membership Records Office and the Office of Probation of any change in any of this information no later than 10 days after the change.

3. Respondent must report, in writing, to the State Bar's Office of Probation no later than January 10, April 10, July 10, and October 10 of each year or part thereof in which Respondent is on probation (reporting dates).<sup>6</sup> However, if Respondent's probation begins less than 30 days before a reporting date, Respondent may submit the first report no later than the second reporting date after the beginning of his probation. In each report, Respondent must state that it covers the preceding calendar quarter or applicable portion thereof and certify by affidavit or under penalty of perjury under the laws of the State of California as follows:
  - (a) In the first report, whether Respondent has complied with all the provisions of the State Bar Act, the Rules of Professional Conduct, and all other conditions of probation since the beginning of probation; and
  - (b) In each subsequent report, whether Respondent has complied with all the provisions of the State Bar Act, the Rules of Professional Conduct, and all other conditions of probation during that period. During the last 20 days of this probation, Respondent must submit a final report covering any period of probation remaining after and not covered by the last quarterly report required under this probation condition. In this final report, Respondent must certify to the matters set forth in subparagraph (b) of this probation condition by affidavit or under penalty of perjury under the laws of the State of California.

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<sup>6</sup> To comply with this requirement, the required report, duly completed, signed and dated, must be received by the Office of Probation on or before the reporting deadline.

4. Subject to the proper or good faith assertion of any applicable privilege, Respondent must fully, promptly, and truthfully answer any inquiries of the State Bar's Office of Probation that are directed to Respondent, whether orally or in writing, relating to whether Respondent is complying or has complied with the conditions of this probation.
5. Within one year after the effective date of this order, Respondent must attend and satisfactorily complete (a) the State Bar's Ethics School and he must provide satisfactory proof of such completion to the State Bar's Office of Probation within that same timeframe. This condition of probation is separate and apart from Respondent's California Minimum Continuing Legal Education (MCLE) requirements; accordingly, Respondent is ordered not to claim any MCLE credit for attending and completing this course. (Rules Proc. of State Bar, rule 3201.)<sup>7</sup>
6. Respondent's probation will commence on the effective date of this order imposing discipline in this matter.

### **Costs**

It is further recommended that costs be awarded to the State Bar in accordance with section 6086.10 and that such costs be enforceable both as provided in section 6140.7 and as a money judgment.

Dated: March \_\_\_\_, 2010

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DONALD F. MILES  
Judge of the State Bar Court

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<sup>7</sup> Respondent is not required to take and pass the Multistate Professional Responsibility Examination, this court concluding that such is not required to protect the public. (*In the Matter of Respondent G* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 175, 180.)